



7400-01-P

MERIT SYSTEMS PROTECTION BOARD

5 CFR Parts 1201 and 1210

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) is adopting as final an interim rule that adapted the Board's regulations to legislative changes which created new laws applicable to the removal or transfer of Senior Executive Service employees of the Department of Veterans Affairs.

DATES: *Effective:* [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW, Washington, DC, 20419; phone: (202) 653-7200; fax: (202) 653-7130; or email: mspb@mspb.gov.

SUPPLEMENTARY INFORMATION:

On August 19, 2014, the Board published an interim final rule (79 FR 48941) that amended 5 CFR 1201.3 and added a new 5 CFR

part 1210 to the Board's adjudicatory procedures in response to amendments to Federal law contained in the Veterans' Access to Care through Choice, Accountability, and Transparency Act of 2014, Public Law 113–146 (the Act). Two days later, on August 21, 2014, the Board amended the interim final rule by making certain technical corrections to definitions and citations. 79 FR 49423.

As the Board explained in detail in the interim rule at 79 FR 48941-48942, section 707(a) of the Act created 38 U.S.C. 713, which contains new rules for the removal or transfer of Senior Executive Service employees of the Department of Veterans Affairs (covered SES employees) for performance or misconduct, requires expedited review of appeals of such actions by the MSPB, and limits review of such actions to a final decision issued by an MSPB administrative judge. Paragraph (b) of section 707 of the Act requires the MSPB to develop and to put into effect expedited procedures for processing appeals filed pursuant to 38 U.S.C. 713 and to submit a report to Congress within 14 days that addresses several matters, including the steps the Board is taking to conduct the expedited review required under the Act. The Board submitted the required report to Congress

on August 21, 2014. A copy of the report is available at the Board's Web site (www.mspb.gov).

The MSPB received comments concerning its interim final rule from the National Employment Lawyers Association, the law firm of Passman and Kaplan, and the American Civil Liberties Union of the Nation's Capital. The comments are available to the public at the Board's Web site (www.mspb.gov). These commenters raised several concerns with the interim final rule.

The commenters asked the MSPB to reconsider limitations on discovery set forth in part 1210. While the Board understands the position of the commenters, it remains convinced that broader discovery rules are incompatible with the requirement to adjudicate within 21 days cases filed under 38 U.S.C. 713. Accordingly, the Board will retain the current discovery rules, which limit the parties to 10 interrogatories, no depositions, and no second round of discovery. The Board notes that, under part 1210, the administrative judge has the discretion to allow additional discovery and alter discovery procedures when he or she deems it necessary.

A commenter asked the MSPB to expand the scope of materials that an agency must disclose when taking an action covered by part

1210. The interim rule provides that an agency must supply a copy of the “response file” (all documents and evidence the agency used in making the decision to remove or transfer a covered employee). 5 CFR 1210.2(c) and 1210.5(c). The Board has concluded that the current “response file” is sufficient to inform the employee of the reasons supporting the agency action and that expanding the scope of required disclosures is not necessary because the additional information identified by the commenters can be obtained in discovery.

A commenter objected to the Board’s regulation imposing a rebuttable presumption in favor of the Secretary’s penalty determination as inconsistent with 38 U.S.C. 713, 5 U.S.C. 7701, and Board case law. The Board respectfully disagrees with this comment.

As the commenter noted, the Board’s current regulation states that proof of underlying misconduct or poor performance by the agency creates a presumption that the penalty (removal or transfer) was warranted. 5 CFR 1210.18(a). An appellant may rebut this presumption by establishing that the selected penalty was unreasonable under the circumstances of the case. Id.

In drafting part 1210, the Board sought to interpret 38 U.S.C. 713 in accordance with its plain meaning and Congressional intent. Consistent with these considerations, part 1210 requires the Department of Veterans Affairs to prove its charges of misconduct and poor performance by preponderant evidence, as required in appeals filed at the Board under 5 U.S.C. 7701.

The commenter correctly notes that the penalty analysis set forth in part 1210 differs from the penalty analysis the Board employs in other appeals. Generally, the Board requires that an agency prove by preponderant evidence that the penalty promotes the efficiency of the service and is reasonable. In so doing, the Board reviews an agency-imposed penalty to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. Douglas v. Veterans Admin., 5 M.S.P.R. 280, 306 (1981).

However, under 38 U.S.C. 713(a)(1), “[t]he Secretary may remove an individual from a Senior Executive Service position . . . if the Secretary determines the performance or misconduct of the individual warrants such removal.” The Board has interpreted this unqualified language as granting the Secretary of the Department of

Veterans Affairs broad discretion in selecting the appropriate penalty for proven misconduct or poor performance. In order to afford appropriate deference to the Secretary's penalty decision, while at the same time preserving the Board's ultimate authority to review such a determination in an appeal filed with the Board, the Board has interpreted 38 U.S.C. 713 as requiring the use of a rebuttable presumption in favor of a penalty selected by the Secretary. Applying the penalty analysis employed in other MSPB appeals to appeals filed under 38 U.S.C. 713 would be inappropriate, as the law governing other appeals simply does not require the deference required under 38 U.S.C. 713.

A commenter asked the MSPB to amend part 1210 to state that filing an appeal with the MSPB under section 707 of the Act is not an election of remedies barring pursuit of other statutory or regulatory appeal or complaint processes, such as filing an equal employment opportunity complaint, an individual right of action appeal, and claims under the Uniformed Services Employment and Reemployment Rights Act. The Board will not address this issue because it believes that such legal issues should initially be addressed through normal litigation processes. In addition, part 1210 is intended primarily to

create procedures that will enable MSPB administrative judges to decide cases filed under 38 U.S.C. 713 within 21 days as required by that statute. The election of remedies issue presented by the commenter was not addressed in the interim rule and addressing this issue now will not further serve the purpose for which the Board promulgated part 1210.

A commenter asked the Board to amend its regulations to state that a decision issued under part 1210 would have no res judicata effect in any other type of action because an MSPB decision on an appeal filed under 38 U.S.C. 713 will not satisfy due process requirements. The Board will not include such a statement in part 1210. The Board has no authority to determine the legal effect of its decisions in other fora. In addition, the Board has stated that it lacks the authority to determine the constitutionality of a statute. Brooks v. Office of Pers. Mgmt., 59 M.S.P.R. 207, 215 n. 7 (1993).

A commenter urged the MSPB to add a new regulation requiring the Department of Veterans Affairs to pay for a complete hearing transcript in all cases decided under part 1210. The commenter further suggested that the Board amend part 1210 to mandate that the hearing transcript and all hearing exhibits be sent to the Department of

Veterans Affairs Inspector General and House and Senate oversight committees.

The Board has considered this proposal but will not amend its regulations as requested. A copy of the hearing compact disc, hearing transcript (to the extent a hearing transcript is contained in the Board's files), and all hearing exhibits can be made available to interested parties as permitted under Federal law, including, but not limited to, the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, 5 CFR parts 1204 and 1205, and 5 CFR 1201.53. The Board notes that the final decisions in all appeals decided under part 1210 will be available for public review in the same manner as Board final decisions in other types of appeals.

A commenter asked the MSPB to amend its regulations to ensure that each side will have sufficient and equal time to present their cases, despite statutorily-required time constraints on completion of the appeal. The Board expects that its administrative judges will ensure that the parties are given a fair opportunity to present evidence and that the requested regulatory change is therefore unnecessary.

A commenter suggested that in view of the limitations that part 1210 places on discovery and the inability of the three-member Board

at MSPB headquarters in Washington, DC, to review an administrative judge's evidentiary rulings, the Board should amend part 1210 to allow greater latitude in the scope of witness examination and include a requirement that administrative judges should avoid excluding evidence or witness testimony to the greatest extent possible. The Board does not believe that such additional requirements are necessary. Given the statutorily-required time limits in covered appeals, MSPB administrative judges must be allowed to limit the introduction of irrelevant or duplicative evidence as they do under normal Board procedures. The Board has a high degree of confidence in the ability of its administrative judges to fairly conduct the expedited review required under 38 U.S.C. 713.

A commenter asked the Board to amend its regulations to state that section 707 of the Act in no way modifies the Special Counsel's prosecutorial authority under 5 U.S.C. 1215. The Board will not address this issue because, as noted above, it believes that such legal issues should initially be addressed through the normal litigation process. In addition, part 1210 is intended primarily to create procedures that will enable MSPB administrative judges to decide appeals filed under 38 U.S.C. 713 within 21 days, as required by the

Act. Addressing the issue presented by the commenter will not further that goal.

A commenter suggested that MSPB should amend its regulations to require the agency to file a protective order when it refuses to reply to a discovery request. The commenter suggested that such a procedure would be quicker and more efficient than requiring an appellant to file a motion to compel discovery. While the Board understands how this proposal could perhaps speed the resolution of certain discovery disputes, the Board believes that its current discovery procedures have generally proven to work well and will allow the parties ample time to resolve discovery disputes. However, to the extent that timely completion of discovery is identified as a problem in cases brought under part 1210, the Board may reconsider this proposal as a means of speeding completion of discovery.

A commenter asked the MSPB to amend its regulations to allow parties to seek modification of exhibit and witness lists in response to discovery requests. As noted earlier, MSPB administrative judges fully appreciate the practical difficulties facing the parties as they assemble and present a case within the 21-day deadline mandated by

the Act and the Board expects its administrative judges to allow timely requests to modify exhibit and witness lists.

As of the date of submission of this final rule for publication in the Federal Register, no appeals have been filed with the Board under 38 U.S.C. 713. The Board may reexamine part 1210 procedures in light of actual experience and will, if necessary, seek additional comment on its procedures and/or propose amendments to part 1210.

List of Subjects in 5 CFR Parts 1201 and 1210

Administrative practice and procedure.

William D. Spencer

Clerk of the Board

Corrected Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 5 CFR Parts 1201 and 1210, which was published at 79 FR 48941 on August 19, 2014, 2014, and subsequently corrected at 79 FR 49423 on August 21, 2014, is adopted as a final rule without change.

[BILLING CODE 7400-01-P]

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